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BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)
)
NOVACON HOLDINGS, LLC) No. 04-0064
)
Application for a certificate)
of local and interexchange)
authority to operate as a)
reseller and facilities-based)
carrier of telecommunications)
services throughout the State)
of Illinois.)

Chicago, Illinois
March 8th, 2004

Met pursuant to notice at 10:00 a.m.

BEFORE:
MR. JOHN RILEY, Administrative Law Judge.

1 APPEARANCES:

2 MR. STEPHEN J. MOORE and
3 MR. THOMAS H. ROWLAND
4 200 West Superior Street
5 Chicago, Illinois 60610
6 appeared for the Applicant;

7 FEWKES WENTZ & STRAYER, by
8 MR. WILLIAM H. WENTZ
9 184 Shuman Boulevard
10 Naperville, Illinois 60563
11 appeared for the Applicant;

12 MR. SEAN R. BRADY and
13 MR. CARMEN L. FOSCO
14 160 North LaSalle Street
15 Chicago, Illinois 60601
16 appeared for Staff;

17 SCHWARTZ, COOPER, GREENBERGER &
18 KRAUSS, CHTD., by
19 MR. EDWARD S. WEIL
20 180 North LaSalle Street
21 Chicago, Illinois 60601
22 appeared for the Intervenor,
Bruce Levin;

MR. JAMES L. KOPECKY
350 North LaSalle Street
Chicago, Illinois
appeared for the Intervenor,
Bruce Levin.

SULLIVAN REPORTING COMPANY, by
Teresann B. Giorgi, CSR and
Michael R. Urbanski, CSR

22

1	<u>I N D E X</u>				
2					
3	<u>Witnesses:</u>	<u>Dir.</u>	<u>Crx.</u>	<u>Re-</u> <u>dir.</u>	<u>Re-</u> <u>crx.</u>
4	Kirk Scholle	26	33		By <u>Examiner</u>
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1	<u>E X H I B I T S</u>		
2	<u>APPLICANT'S</u>	<u>For Identification</u>	<u>In Evidence</u>
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1 JUDGE RILEY: Pursuant to the direction
2 of the Illinois Commerce Commission I now call
3 Docket 04-0064. This is an application of Novacon
4 Holdings, LLC for a certificate of local and
5 interexchange authority to operate as a reseller and
6 facilities-based carrier of telecommunications
7 services throughout the State of Illinois.

8 Beginning with Counsel for the
9 Applicant, would you enter an appearance for the
10 record, please.

11 MR. MOORE: Thank you. On behalf of Novacon
12 Holdings, Thomas Rowland and Steve Moore, 200 West
13 Superior Street, Suite 400, Chicago, Illinois 60610.

14 MR. WENTZ: And, also, for the Applicant,
15 Novacon Holdings, LLC, William H. Wentz, W-e-n-t-z,
16 of the law firm of Fewkes, that's spelled
17 F-e-w-k-e-s, Wentz & Strayer, 184 Shuman Boulevard,
18 Suite 250, Naperville, Illinois 60563.

19 JUDGE RILEY: Thank you.

20 And Staff, enter an appearance,
21 please.

22 MR. BRADY: Appearing on behalf of the Staff of

1 the Illinois Commerce Commission, Sean R. Brady and
2 Carmen L. Fosco, 160 North LaSalle Street,
3 Suite C-800, Chicago, Illinois 60601.

4 JUDGE RILEY: And for the intervenor, please.

5 MR. WEIL: Edward S. Weil, W-e-i-l, of the firm
6 Schwartz, Cooper, Greenberger & Krauss, that's
7 K-r-a-u-s-s, appearing on behalf of Bruce Levin.

8 MR. KOPECKY: And Jim Kopecky, K-o-p-e-c-k-y, of
9 James L. Kopecky, PC, 350 North LaSalle Street,
10 Suite 800, also appearing on behalf of Mr. Levin.

11 JUDGE RILEY: All right. Thank you.

12 At this time I had sent written notice
13 last Wednesday, whatever date that was, I guess it
14 was the 3rd, granting the Petitioner's request for
15 leave to intervene.

16 I have two other motions pending
17 before us that I have not ruled on, yet. One is the
18 motion for proprietary and confidential treatment of
19 the financial data that had been submitted by the
20 Applicant.

21 Counsel, do you have anything further
22 to say on behalf of that motion?

1 MR. ROWLAND: No, we have a draft proprietary
2 agreement.

3 JUDGE RILEY: All right.

4 MR. WEIL: Your Honor, as I indicated last week,
5 the concept is understandable and acceptable. It's
6 the breadth that was a concern to us. So, I'm not
7 sure if this is the draft that's been promulgated or
8 not, but to the extent -- and I'll say this on the
9 record, to the extent that it doesn't seek to
10 preclude Mr. Levin from asserting his rights in this
11 forum or in any other forum, then, we don't have an
12 opposition to keeping the matters that are discussed
13 in these proceedings confidential.

14 JUDGE RILEY: I'm not 100 percent sure of your
15 response.

16 How can he maintain confidentiality if
17 Mr. Levin has access to it? It seems to me that's
18 what your response is. I'm not sure if I'm correct
19 in that.

20 MR. WEIL: I'm not sure what the motion is.

21 MR. ROWLAND: Well, perhaps, Mr. Weil is not
22 familiar with ICC cases. But, basically, when there

1 is competitive information available, the idea is to
2 keep particular numbers out of just anybody's hands.
3 If it is necessary, for the case that we're in right
4 now, we can discuss how this information is made
5 available, but we suggest that it be made available
6 to Counsel for Mr. Levin and he can argue anything
7 he wants.

8 It is restricted to this case,
9 however. We are not suggesting that this
10 information be useful in any other proceeding and
11 that's the way a lot of ICC cases are.

12 JUDGE RILEY: So, it's strictly for this docket.

13 MR. ROWLAND: Yes, absolutely.

14 MR. WEIL: And my two responses are, No. 1, any
15 agreement with respect to this document doesn't
16 relate to Novacon LLC, which is not the Applicant,
17 (a), and (b) of which Mr. Levin is a majority owner.
18 Of course, he has the right to hear any financial
19 data, including numbers, as it relates to a
20 non-Applicant, Novacon LLC.

21 And the only other comment I would
22 make is, there has been discussion already on the

1 record that the Applicant here has hundreds of
2 customers. So, that's in the record.

3 I'm not sure if you're trying to limit
4 those kinds of general statements, or rather if
5 you're circumscribing this as it relates to specific
6 numbers.

7 But, I should say, also, it's unclear
8 that it should have any number because it doesn't
9 have a license.

10 JUDGE RILEY: Well, that's something else
11 entirely.

12 MR. WEIL: Subject to those points, I don't have
13 an objection.

14 JUDGE RILEY: One of the questions I would
15 have is that Mr. Levin is a principal owner of
16 Novacon LLC. Wouldn't he have that information
17 under any circumstances?

18 MR. WEIL: He would if they had given it to him,
19 but they have elected not to do so.

20 MR. ROWLAND: Well, I don't know if that's a
21 correct statement.

22 MR. WEIL: Well, that will come into the record.

1 JUDGE RILEY: All right, let's -- gentlemen --

2 MR. ROWLAND: I think Mr. Levin has to enter
3 into a proprietary agreement to get the information.
4 That's the understanding.

5 JUDGE RILEY: Yeah. My concern is -- it's a
6 twofold concern. The information, first of all, let
7 me clear this up, that was -- the financial data
8 that we're talking about, Exhibits G and H, as it
9 was filed on the e-docket system, this is for
10 Novacon Holdings, LLC, is that correct, that is for
11 the Applicant.

12 MR. ROWLAND: Correct.

13 JUDGE RILEY: All right. My concern is twofold,
14 one, Mr. Levin has his own telecom firm and as a
15 result, he is a competitor of other telecom firms.
16 And we, routinely, protect financial information
17 from competitors.

18 By the same token -- not by the same
19 token, but on the other hand, I want to give you
20 access to everything you need to conduct a proper
21 cross-examination and to put on a proper case in
22 chief. If that means having to have access to that

1 information -- Counsel, was I correct in saying that
2 you would not object to Counsel having access to the
3 information --

4 MR. ROWLAND: That's correct.

5 JUDGE RILEY: -- but, not Mr. Levin.

6 MR. ROWLAND: That's my concern.

7 MR. WEIL: We have not --

8 MR. ROWLAND: For use in this case only.

9 JUDGE RILEY: Yes, right.

10 MR. WEIL: We have not seen -- Counsel and I
11 have not seen Exhibits G and H as of yet. And since
12 we are about to conduct this hearing, I'm not sure
13 it's going to help me if I get it after the hearing.

14 JUDGE RILEY: You'll have to have it during the
15 pendency of the proceedings here.

16 MR. ROWLAND: We can, certainly, make it
17 available to you.

18 MR. WEIL: That's fine.

19 JUDGE RILEY: All right, then, I am going to
20 grant the motion for confidential and proprietary
21 treatment of those two items, marked as Exhibits G
22 and H on the Commission web site.

1 The other motion I had to deal with
2 was a motion to strike the informal complaint that
3 had been submitted with the intervenor's reply.

4 And did you have anything further on
5 that, Counsel?

6 MR. MOORE: We have a reply that we filed just
7 this morning at 9:00 o'clock. We still do think
8 it's something that should be ruled on, even though
9 petition to intervene had been granted, we were
10 concerned that with the attachment of the
11 complaint -- of the draft complaint to one of the
12 pleadings, and that's what we're moving to strike.
13 We had a discussion of the draft complaint, it was
14 attached to the response to our objection to their
15 petition to intervene, that's what we moved to
16 strike.

17 We still would like a ruling on that.

18 JUDGE RILEY: Yes.

19 MR. MOORE: And you can make that now, make it
20 as the hearing progresses, whatever is your
21 pleasure.

22 JUDGE RILEY: Let me go back to one thing with

1 regard to the motion for confidentiality and
2 proprietary. Staff, I apologize, I left you out of
3 that. Did Staff want to weigh in on that at all?

4 MR. BRADY: No. As far as -- I mean, from
5 Staff's point of view, I think that's given to us,
6 we maintain -- label it confidentiality, we maintain
7 that pursuant to our statute as far as being
8 confidential.

9 JUDGE RILEY: All right. Fine.

10 Mr. Moore, I'm not 100 percent sure I
11 followed everything you said there.

12 MR. MOORE: All right. Motion to strike -- the
13 essence of the motion to strike is, we don't believe
14 that the matters discussed in the complaint are
15 appropriate for discussion in this case. The main
16 thing we're attempting to strike was the discussion
17 of those matters and the draft complaint itself that
18 had been attached to the response of Bruce Levin to
19 our objection to intervene.

20 JUDGE RILEY: Okay. Counsel, anything further?

21 MR. WEIL: Well, I just wanted to note for the
22 record that we did file a response, and --

1 MR. ROWLAND: I think we got that over the
2 weekend.

3 MR. MOORE: We got that late Friday and we
4 replied --

5 MR. WEIL: I want to ensure that the
6 Administrative Law Judge had received it.

7 JUDGE RILEY: Yes.

8 MR. ROWLAND: And, Judge, just so you have it,
9 I've sent this around to all the parties, but this
10 is our reply memorandum.

11 JUDGE RILEY: Yes.

12 MR. WEIL: I think it's already been ruled on
13 insofar as you granted the petition to intervene.
14 And that was part of those briefs.

15 Second, it's not evidence. We're not
16 presenting it as evidence.

17 Third, it's not new -- I mean, this
18 proceeding is new.

19 And fourth, we think the matters that
20 are identified in there are germane, but in any
21 event, are going to be presented at this hearing in
22 the proper fashion in the sense of evidence. It's

1 not being presented as evidence.

2 JUDGE RILEY: Okay. That's my concern here --
3 not concern, but my lack of comprehension. It reads
4 like an indictment, that you've alleged various
5 counts violating sections of the Public Utilities
6 Act. And that is something of concern by the
7 Commission -- that would only be determined by the
8 Commission.

9 I don't know why -- we don't deal with
10 informal complaints. Generally, complaints are
11 formalized and pursued as separate dockets. Plus,
12 there are some items attached here, security
13 agreement, resolutions, a letter and there's a
14 third letter.

15 MR. WEIL: Which Counsel has taken up, the
16 banner of, by addressing in their reply, so. . .
17 They have identified the -- and attached the
18 security agreement themselves in their reply they
19 filed this morning.

20 MR. ROWLAND: Intervention was granted. We
21 needed to act quickly in getting, you know, the
22 facts to your Honor. We're not opening up the whole

1 proceeding to anything they want to talk about
2 related to, in this case, spurious claims about
3 Article 7, inner corporate relations, that clearly
4 do not apply.

5 And, briefly, Mr. Weil's point about
6 this is not new or whatever, they didn't attach this
7 until Monday morning when we got a copy of that --
8 their reply on the intervention. I mean, it's
9 highly prejudicial. And, as you say, it's a
10 stinging indictment, and it's beyond the pale.

11 If they want to do something separate
12 in the future, they have the right, you know, to
13 knock themselves out. But we shouldn't be
14 prejudiced by getting our application in this case.
15 I see this as highly unfair. And if we want to
16 discuss matters that you see are relevant, you know,
17 we'll deal with that. But we don't think they
18 should just be able to have a broad indictment
19 beyond what's at issue for this application, and,
20 particularly, when they're relying on things that do
21 not apply for what this Commission can grant.

22 MR. WEIL: The only concern I have is, I don't

1 want there to be any prejudgment in terms of what is
2 and what is not germane. We know what's germane for
3 this proceeding. It's what the statute says is
4 germane. We're not going to go, at all, beyond
5 precisely the technical, financial and managerial
6 considerations, which the statute lays out. That's
7 it.

8 JUDGE RILEY: Staff, did Staff have anything to
9 offer with regard to the motion to strike the
10 informal complaint?

11 MR. BRADY: We have no formal position on
12 striking the informal complaint. Although, I guess,
13 I would note that it's -- it wouldn't be -- it
14 raises points that, again, as we had said at a
15 previous hearing, that are of interest, however, we
16 are looking to limit this to just a review of the
17 certification case.

18 And, so, not to speak on the merits of
19 each one of these items that are discussed within
20 here, it just raises some items of interest to Staff
21 to be looked at within this proceeding.

22 JUDGE RILEY: Well, I suppose that we can get to

1 that. I am going to say that, I think, that the
2 motion is well-taken. I'm going to grant it. I'm
3 very uncomfortable about this. And, I think, it's
4 going to be -- well, let me leave it at that.

5 The motion is granted.

6 Was there anything else that was
7 outstanding prior to getting to the substance of
8 this matter?

9 MR. ROWLAND: We're ready to put on our witness.

10 JUDGE RILEY: You're ready to call a witness?
11 All right, then, Counsel --

12 MR. BRADY: I would like to state, your Honor,
13 that there's a lot of information that's coming in
14 fairly recently on this docket. It's an unusual
15 certification case. And, Staff is -- I guess, we
16 are a little hesitant in moving forward. We don't
17 want to hold up the proceeding. We may need to put
18 Mr. Koch -- bring Mr. Koch for direct examination,
19 which is unusual for a certification case. And, in
20 light of the fact that we won't know until we,
21 actually, look and listen to -- and get a better
22 idea of what's transpired here.

1 Obviously, we'd be proceeding in a way
2 that's different than we normally proceed. Normally
3 we file direct testimony prior to the hearing.

4 JUDGE RILEY: Right.

5 MR. BRADY: So, we would need to be doing more
6 of a traditional forum and have to do an oral
7 direct. So, I just wanted to present that to your
8 Honor.

9 In addition, we may need to ask for a
10 little bit of time so we can -- a pause, so we can
11 talk to Staff and -- to coordinate that prior to
12 moving forward in light of the way this case is
13 moving forward so quickly, to present information to
14 you. And we are concerned that we may not be able
15 to -- Staff may not get all of its information
16 today. We may need to issue, I don't know, data
17 requests or what. At this point, we're a little
18 concerned that all the information may not be on the
19 table for Staff to be able to have its position
20 fully flushed out by the end of today's hearing.

21 MR. ROWLAND: Novacon Holdings is more than
22 willing to provide Staff with whatever they need and

1 anybody else who has a legitimate interest in the
2 information that's related to this proceeding.

3 We are interested in moving this
4 hearing along. And if Staff has any additional data
5 requests or whatever, they want to file data
6 requests, we're more than happy to answer them.

7 This hearing has been put off for one
8 week and we are in need of getting the application.

9 JUDGE RILEY: Okay. The procedure is going to
10 be as follows, is that Applicant is going to call
11 its witness. I will grant Staff and the intervenor,
12 in that order, I will grant -- strike that.

13 Staff will cross-examine. The
14 intervenor will cross-examine. I will ask any
15 questions I have. Generally, I have a set of
16 standard questions that I ask just for my own
17 record. After which I'm going to move for -- not
18 move, but have Staff proceed with this witness and
19 then the intervenor.

20 MR. WEIL: May I ask a procedural question?

21 JUDGE RILEY: Go ahead.

22 MR. WEIL: Insofar as we've been given the

1 opportunity to review Exhibits G and H, firstly,
2 we'd like to see them.

3 And, secondly, to the extent that we
4 have specific cross-examination questions relating
5 to those exhibits, I assume, Mr. Levin should excuse
6 himself during those questions. Is that the
7 protocol?

8 MR. ROWLAND: Yeah, I think if we put in camera
9 in the transcript, I think that would be
10 appropriate.

11 JUDGE RILEY: I'm inclined to agree.

12 MR. WEIL: And is that portion of the
13 transcript, then, sealed, in essence?

14 MR. ROWLAND: Yes.

15 JUDGE RILEY: Right.

16 MR. WEIL: So, we would like to put on the
17 record our request now for Exhibits G and H.

18 JUDGE RILEY: Okay.

19 MR. ROWLAND: We can provide you with that.

20 MR. MOORE: Just to be clear, there will be
21 redirect after the cross-examination?

22 JUDGE RILEY: Yes.

1 MR. MOORE: That wasn't in your scenario.

2 MR. WEIL: So, after Mr. Scholle testifies, his
3 examination is completed, assuming that's the last
4 witness for the Applicant, the notion would be that
5 Staff would, then, put witnesses on?

6 JUDGE RILEY: That's the way I'm leaning right
7 now.

8 Staff, was there a problem with that?

9 MR. BRADY: No, that's fine. I was just going
10 to say, I was thinking when we were finished with
11 Mr. Scholle, as far as all the cross-examination and
12 redirect, yeah, then, I guess --

13 JUDGE RILEY: Okay.

14 MR. BRADY: -- if that's what your Honor would
15 like to do.

16 JUDGE RILEY: Right. Okay.

17 MR. WEIL: Then, do I understand, Staff has put
18 forth the data requests --

19 MR. BRADY: Possibly. Depending on --

20 MR. WEIL: I thought you have already. That's
21 all.

22 MR. BRADY: There was a data request that was

1 set forth. You should have received a copy of that.

2 MR. WEIL: Received it, right. Did not receive

3 the documents.

4 MR. ROWLAND: To my knowledge, Mr. Weil, no one

5 asked us for a copy of the data responses. We're

6 more than happy to make them available, but if we

7 don't get a request --

8 MR. WEIL: I understand.

9 MR. ROWLAND: -- we're not giving out

10 information.

11 MR. WEIL: I did not, yet, file a data

12 request -- a me-too-type of data request response to

13 Staff's on Friday. We were busy filing our response

14 to the petition to strike -- motion to strike. And

15 we will follow-up after this morning's proceeding

16 with a written request. But, in the interim, I'm

17 requesting on the record, orally now, to get -- give

18 us a copy of the documents that we haven't -- that

19 were given to Staff, I assume, on Friday, to the

20 extent that they are any different than Exhibits G

21 and H, that is.

22 MR. ROWLAND: We have responses of Novacon

1 Holdings to Staff data request. We have a
2 proprietary version and a non-proprietary version.
3 So, I can give you the non-proprietary. But, if you
4 agree that the data request information is bound by
5 the protective agreement --

6 MR. WEIL: He's going to give me the
7 non-proprietary portion. But that does expand the
8 scope of the protective order, beyond Exhibits G and
9 H, is what you're suggesting.

10 MR. ROWLAND: Yes. As long as you agree to be
11 bound by --

12 MR. WEIL: I don't know what's -- is it the same
13 type of information as was in Exhibits G and H,
14 i.e., financial information relating to the
15 Applicant, Novacon Holdings?

16 MR. ROWLAND: Yes. And it's highly sensitive in
17 the sense that it's the operating budget, you know,
18 of the company.

19 MR. WEIL: I don't have a problem with that.
20 That's fine.

21 So, you're handing me the proprietary
22 and --

1 MR. ROWLAND: First, I'm handing you the public
2 version, okay (indicating)?

3 MR. WEIL: This, I can share with my client, the
4 public version.

5 MR. ROWLAND: Yeah. Let's put a big "P" on
6 that, just so we're clear.

7 And this is the confidential one
8 (indicating).

9 MR. WEIL: You can see this one.

10 MR. ROWLAND: We may have to get copies of this.
11 This is the confidential one. And, then, there's an
12 attachment that goes with it. We had an Attachment
13 1, which is the balance sheet.

14 MR. WEIL: If copies are needed after, I'll give
15 it back to you.

16 JUDGE RILEY: Mr. Rowland will you be calling
17 the witness or Mr. Moore?

18 MR. MOORE: I'll be doing it.

19 JUDGE RILEY: Please do so.

20 MR. MOORE: I would like to call as a Novacon
21 witness, Kirk Scholle, that's S-c-h-o-l-l-e.
22 (Witness sworn.)

1 JUDGE RILEY: Okay. Please proceed.

2 THE WITNESS: My name is pronounced Scholle, by

3 the way.

4 KIRK SCHOLLE,

5 called as a witness herein, and after having been

6 first duly sworn, was examined and testified as

7 follows:

8 DIRECT EXAMINATION

9 BY

10 MR. MOORE:

11 Q Could you please state your name.

12 A Kirk Scholle.

13 Q And who is your employer?

14 A Novacon Holdings, LLC.

15 Q And your business address, please.

16 A 1895C Rohlwing Road, Rolling Meadows,

17 Illinois 60008.

18 Q I show you what has been marked as the

19 Direct Testimony of Kirk Scholle on behalf of

20 Novacon Holdings, LLC, Exhibit 1 of Novacon Holdings

21 LLC, did you prepare this testimony or was it

22 prepared under your supervision?

1 A Yes.

2 Q And if asked these questions today, would

3 you give the same answers?

4 A Yes.

5 MR. MOORE: Off the record.

6 JUDGE RILEY: Yes.

7 (Whereupon, a discussion

8 was had off the record.)

9 MR. MOORE: We have no other written testimony,

10 though, Mr. Scholle does have some things he would

11 like to say before we offer him for

12 cross-examination, if that would be accepted as an

13 opening statement.

14 JUDGE RILEY: Well, it's usually customary for

15 Counsel to make the opening statement prior to --

16 you know, prior to any testimony. It is a little

17 bit unusual.

18 MR. WEIL: Yeah, I would object to the extent

19 you're asking the witness to give a narrative,

20 probably, hearsay, blatant statement.

21 JUDGE RILEY: Staff, what's your response, if

22 any?

1 MR. FOSCO: Your Honor, I think, if there's
2 testimony it comes in under questioning.

3 JUDGE RILEY: That's the way I'm leaning right
4 now. It is very unusual for witnesses to go under a
5 narrative.

6 MR. MOORE: Can I ask a few questions, then,
7 before --

8 JUDGE RILEY: Certainly. This is your direct
9 examination. By all means.

10 MR. MOORE: Q Mr. Scholle, could you please
11 provide the Administrative Law Judge and the Staff
12 with some background as to Novacon Holdings, LLC and
13 Novacon LLC, the relationship between the two
14 companies.

15 A I'd be happy to.

16 MR. WEIL: Objection, foundation. I'm sorry,
17 he's the manager of both of them.

18 JUDGE RILEY: Well, I think, that's what he's
19 asking for.

20 MR. WEIL: All right.

21 MR. MOORE: Q Mr. Scholle, are you familiar
22 with Novacon LLC?

1 A Yes.

2 Q In what way are you familiar with Novacon
3 LLC?

4 A I was the manager.

5 Q And during what period of time were you the
6 manager?

7 A April 14th of 2003, through January 10th,
8 2004.

9 Q And are you familiar with Novacon Holdings,
10 LLC?

11 A Yes, I am.

12 Q And in what role are you familiar with
13 Novacon Holdings, LLC?

14 A I am the executive director and a managing
15 partner of Novacon Holdings, LLC.

16 Q And during what period of time have you
17 been the executive director and a partner?

18 A Since January 10th, 2003 -- 4.

19 Q And could you, please, describe the
20 relationship between those two companies?

21 A Holdings was created last spring when
22 Novacon LLC's bank loan was not renewed. It was

1 formed by any member of Novacon LLC, who wanted to
2 participate in paying off the loan and providing a
3 secured loan to Novacon LLC. The loan was defaulted
4 on in November of 2003. And, subsequently, Novacon
5 Holdings, as a secured creditor, received all of the
6 assets of Novacon LLC, based on a vote of members at
7 a member meeting January 10th, 2004.

8 Q What was the affect on services for
9 customers as to this transfer of control?

10 A There was no affect. Customers received a
11 seamless transition from one company to the other.

12 Q If Novacon Holdings had not invested
13 in Novacon LLC, what stage was the finances of
14 Novacon LLC?

15 A They were in rough shape and the ability
16 for Novacon LLC to continue would have been in
17 serious jeopardy.

18 Q Have you had any responses from customers,
19 since the transfer of control, regarding the nature
20 of services?

21 MR. WEIL: Objection, hearsay.

22 JUDGE RILEY: Could you elaborate?

1 MR. WEIL: Sure. He's being asked to testify
2 about out of court savings, offered for the truth of
3 those statements.

4 MR. MOORE: I'm just asking if they've received
5 comments. I'm not asking to recite a history of
6 what those people said.

7 JUDGE RILEY: By "comments" do you mean
8 complaints?

9 MR. MOORE: Complaints, yes.

10 JUDGE RILEY: Okay. I'm going to allow the
11 question about complaints.

12 Have there been any complaints from
13 customers with regard to the service?

14 THE WITNESS: None.

15 MR. MOORE: I have no other questions.

16 At this point we offer Exhibit 1 into
17 evidence.

18 JUDGE RILEY: That's the prefiled testimony of
19 Mr. Scholle?

20 MR. MOORE: Yes.

21 JUDGE RILEY: Marking that as Applicant's
22 Exhibit 1.

1 (Whereupon, Exhibit No. 1
2 was marked for identification
3 as of this date.)

4 MR. BRADY: Have you already laid a foundation
5 as far as him drafting this, his direct testimony?

6 JUDGE RILEY: I'm sorry?

7 MR. BRADY: I'm not sure if they had laid the
8 foundation whether Mr. Scholle has actually drafted
9 his testimony.

10 JUDGE RILEY: No, I heard it. He asked if it
11 was prepared by him or at his direction.

12 MR. BRADY: Okay.

13 JUDGE RILEY: Well, with regard to the motion to
14 admit Applicant's Exhibit 1, the prefiled testimony
15 of Mr. Scholle, is there a response?

16 MR. WEIL: Subject to cross-examination.

17 JUDGE RILEY: Okay. Staff?

18 MR. BRADY: Staff has no objection.

19 JUDGE RILEY: Then, I will hold a ruling in
20 abeyance pending the completion of the
21 cross-examination -- or completion of all the
22 testimony with regard to Mr. Scholle.

1 As is customary, I, generally, turn to
2 Staff at this point.

3 MR. WEIL: That's fine.

4 JUDGE RILEY: I think their examination is going
5 to be a little bit quicker.

6 Mr. Brady, were you going to cross the
7 witness or will --

8 MR. BRADY: Yes, your Honor.

9 JUDGE RILEY: Okay.

10 CROSS EXAMINATION

11 BY

12 MR. BRADY:

13 Q Good morning, Mr. Scholle, my name is Sean
14 Brady.

15 A Good morning.

16 Q I represent Staff of the Illinois Commerce
17 Commission.

18 Do you have a copy of your testimony
19 with you, the direct testimony that you've filed, I
20 believe, this morning.

21 A This (indicating)? Yes.

22 Q I believe so. Yes.

1 What's on my Page 3 starts an
2 answer -- does it start with an answer on your page,
3 as well?

4 A Yes.

5 Q And the second sentence there, which starts
6 on Line 2, it says, To a lesser extent, do you see
7 that sentence?

8 A On page --

9 Q I'm sorry, on Page 3.

10 JUDGE RILEY: Let the record reflect that on the
11 copy that I have, that sentence, To a lesser extent,
12 is, actually, near the bottom of Page 2.

13 MR. BRADY: Q The page numbering starts over on
14 each page, so, I can't give you a line number.

15 The question starts out with, Please
16 briefly describe Novacon Holdings business plan. Do
17 you see that question?

18 A Yes, sir.

19 Q Now, looking at the answer to that
20 question, the second sentence starts, To a lesser
21 extent, and then continues on saying, Novacon
22 Holdings will, also, sell leased lines, local loops

1 is in parentheses, to customers who want to connect
2 two or more facilities together. Do you see that
3 sentence?

4 A Yes, sir.

5 Q Now, you -- and the previous sentence it
6 says you will use leased lines from SBC Ameritech,
7 correct?

8 A Yes.

9 Q Now, are you leasing -- those lines that
10 Novacon Holdings is leasing, are they from SBC's
11 wholesale tariff or their UNE tariff, do you know?

12 A They're from the UNE tariff.

13 Q Proceeding on in your direct testimony,
14 it's on my Page 4, it's a question that says, Who
15 are the members of Novacon Holdings? Do you see
16 that question?

17 A Yes.

18 Q And it says that Novacon LLC is comprised
19 of 14 members, and then later on it says, 11 of
20 those 14 members accepted the offer to participate
21 with Novacon Holdings. Do you see that?

22 A Yes.

1 Q Were you one of the 14 members?

2 A No.

3 Q You were not.

4 A No.

5 Q Who do the 14 members, then, apply to?

6 What were their titles? Were they, essentially,

7 directors and owners of the business? Is that what

8 you're referring to here?

9 A They were owners of Novacon LLC, members.

10 Q So, when you say "members," that's what you

11 mean, essentially, owners of LLC?

12 A Yes, sir.

13 Q Okay. Of those 14 members, were any of

14 those 14 members, or were all of those 14 members,

15 individuals?

16 A Um --

17 Q The opposite being corporate entities.

18 A Oh, yes. They were individuals or trusts.

19 Q Individuals or trusts?

20 A Yes.

21 Q Do you recall the management

22 organization -- let me back up one second.

1 In Novacon Holdings' application for a
2 certificate there was an attachment to that. You
3 detail those attachments on your first page, they're
4 Appendices A through I. Do you have a copy of
5 Exhibit F, which is the resumes of key personnel?
6 If not, I have a copy that I can provide you.

7 MR. ROWLAND: One minute, Counsel.

8 (Short pause.)

9 MR. BRADY: This is just for purposes of
10 discussion. It's not to be admitted as an exhibit.

11 Counsel, do you have a copy of
12 Exhibit F, so, you can follow along with what we're
13 discussing?

14 MR. WEIL: I do. Thank you.

15 MR. BRADY: Here, your Honor, why don't I give
16 you a copy (indicating).

17 MR. MOORE: Can I have one more?

18 MR. BRADY: Sure (indicating).

19 MR. MOORE: It's one page, right?

20 MR. BRADY: Uh-hum.

21 Q Do you have that exhibit in front of you,
22 Mr. Scholle?

1 A Exhibit F?

2 Q Yes, sir.

3 A Yes, sir.

4 Q On this page there are four people

5 identified whose resumes are given, yourself,

6 Mr. Wenick (phonetic), Mr. Madden and

7 Ms. Smith-White. Do you see that?

8 A Yes, sir.

9 Q Were any of them part of the 14 that we

10 were referring to previously?

11 A No.

12 Q So, your testimony, going back to Page 4,

13 the question and answer that we were just looking at

14 regarding the composition of Novacon LLC's members.

15 A Yes.

16 Q 11 of those 14 members were from

17 Novacon LLC, correct?

18 A Yes, sir.

19 Q Are those 11 members still currently with

20 Novacon Holdings?

21 A 10 of the 11 are.

22 Q To your knowledge, are those 10 members

1 still part owners of Novacon LLC?

2 A (No response.)

3 Q If you don't know, just say you --

4 A I would think so. Yes.

5 JUDGE RILEY: That's speculative.

6 MR. BRADY: Okay.

7 JUDGE RILEY: In other words, you don't know, is

8 that the correct answer to the question?

9 MR. BRADY: Q And if you don't know, then

10 it's --

11 A They are, I believe. Yes.

12 Q Mr. Scholle, do you have a copy of the

13 application for certificate that was filed with the

14 Commerce Commission? If not, I have copies that I

15 can give you.

16 Do you have a copy?

17 JUDGE RILEY: Is that the original petition?

18 MR. BRADY: Yes.

19 JUDGE RILEY: I have it right here.

20 MR. WEIL: Are you including with that the

21 errata?

22 MR. BRADY: Not at this time. I'm just focusing

1 on the original application.

2 Q Let me know when you have that,

3 Mr. Scholle.

4 A I have it right here.

5 Q Great.

6 On the third page -- can you turn to

7 the third page of that application, and there's

8 Item 12.

9 A Yes, sir.

10 Q And that question is, Has Applicant

11 provided service under any other name? Do you see

12 that question?

13 A I do.

14 Q Now, in this original application it was

15 marked "Yes," correct?

16 A Correct.

17 Q And then, underneath that there's a

18 statement, If yes, please list, and then there

19 was a blank line, and that line was filled in as

20 Novacon LLC?

21 A Correct.

22 Q And there was a -- then, subsequent to this

1 there was an errata that was issued, correct?

2 A Correct.

3 Q And in the errata the "yes" was changed to

4 a "no."

5 A Correct.

6 Q Why was that?

7 A Because Novacon Holdings had never done

8 business under any other name and that was made --

9 the errata was made to correct that original answer.

10 Q Why was it originally filed as Novacon LLC?

11 A It was a clerical error.

12 Q Mr. Scholle, in response to Staff Data

13 Request 1.4, and part of this response is

14 confidential, so, I'm not going to list the number.

15 The question on 1.4 was, Please indicate whether

16 Novacon Holdings, LLC has received customers of

17 Novacon LLC. If so, please indicate the number of

18 customer accounts received and a copy of any

19 notification provided to customers pertaining to the

20 change in carrier.

21 A That was 1.4 you're referring to?

22 Q That was 1.4.

1 A Yes, sir.

2 MR. WEIL: May I just state the confidential
3 response that I have doesn't seem to indicate the
4 number. Is this the number -- excuse me, I'm sorry
5 to interrupt.

6 Is that the number (indicating)?

7 MR. ROWLAND: Yes.

8 Please don't say it out loud.

9 MR. WEIL: I won't.

10 I see it now. Thank you.

11 MR. BRADY: Q So, Novacon Holdings -- according
12 to this, your response here, Novacon Holdings is
13 providing service to a number of identifiable
14 customers, correct?

15 A Yes, sir.

16 Q Are any of those customers business
17 customers?

18 A Yes.

19 Q Do they have less than 20 lines -- do any
20 of your customers have less than 20 lines?

21 A With us?

22 Q Uh-hum.

1 A Yes.

2 Q Do you know if all of them have less than
3 20 lines with you?

4 A Yes, all of them have less than 20 lines.

5 Q Okay. Are any of your customers
6 identified, in this response to 1.4, residential
7 customers?

8 A No -- well, let me amend that by saying, we
9 have a couple of customers who are receiving T1 data
10 services from us, at home offices, but they are
11 business customers.

12 Q Okay. Thank you.

13 Now, I believe you said that
14 Novacon Holdings started providing service as of
15 January 10th?

16 A Yes, sir.

17 Q Was there a request sent to your
18 subscribers requesting a transfer -- notifying them
19 of a transfer of providers?

20 A I'm not sure I understand the question.

21 Q Sure.

22 A A request?

1 Q To your knowledge, was a request sent to
2 the Novacon LLC subscribers notifying them that as
3 of January 10th, and after that date, Novacon
4 Holdings would be providing them service?

5 A We provided an invoice stuffer that -- the
6 notification that was sent out was with the
7 billings. We notified them of an address and phone
8 number, contact information change.

9 Q When was that sent?

10 A The latter part of January of 2004.

11 MR. BRADY: Counsel, in response to 1.4 you had
12 said that you would be providing a copy of the
13 notice under separate cover.

14 MR. ROWLAND: Yes. And, I believe, we sent it
15 as a follow-up.

16 MR. BRADY: Okay.

17 MR. ROWLAND: And I think you should have -- I
18 think Bob Koch should have it.

19 MR. BRADY: And this is it here (indicating)?

20 MR. ROWLAND: Yes.

21 MR. BRADY: Will you stipulate to this or shall
22 I, actually --

1 MR. ROWLAND: No, we'll stipulate that's what
2 was sent out.

3 MR. BRADY: Okay.

4 Q Mr. Scholle, Mr. Moore had posed some
5 questions to you at the beginning of your testimony.

6 A Yes, sir.

7 Q And in response, I believe, you said that
8 you were the manager of Novacon LLC from April 14th,
9 2003, to January 10th, 2004?

10 A Yes.

11 Q So, you have resigned your position with
12 Novacon LLC?

13 A Actually, I have not.

14 Q Okay. Thank you.

15 So, your title is -- what is your
16 exact title, managing -- manager or managing
17 partner?

18 A Managing partner of Novacon Holdings, LLC.

19 Q Mr. Scholle, do you have a copy of Novacon
20 Holdings' response to Data Requests -- Staff Data
21 Request 1.1 and 1.2?

22 Your Honor, did you get a copy of this

1 (indicating)?

2 JUDGE RILEY: Yeah, I haven't seen any of this.

3 As a matter of fact, I need a copy of

4 that notice, too.

5 MR. BRADY: Of this (indicating)? Yeah, I'm

6 going to admit that at the end.

7 JUDGE RILEY: Okay.

8 MR. BRADY: Q Do you need a copy, Mr. Scholle,

9 because I have extras.

10 MR. ROWLAND: If you have extras, because, I

11 think, I gave mine to Mr. Weil.

12 MR. BRADY: Sure (indicating).

13 JUDGE RILEY: Before you go any further,

14 Counsel, is it my understanding, then, the data

15 that's attached to these data requests, this is all

16 part of -- contained within the protective order?

17 MR. BRADY: Yes, it is, your Honor.

18 And these questions do pertain to some

19 of the proprietary nature that's within there. I

20 can -- I have one other line of questioning -- no --

21 this is about the final line of questioning, so, if

22 we can go -- you know, part of it in camera --

1 MR. WEIL: If there's a specific -- in all due
2 respects, if we can await the actual question that
3 is designed to elicit the proprietary information
4 before we excuse Mr. Levin.

5 MR. BRADY: That's fine.

6 JUDGE RILEY: One of the things I was going to
7 suggest, though, is that under any circumstances,
8 whatever those questions are, I don't want him
9 having to go in and out constantly. I don't know if
10 that's avoidable, but. . .

11 MR. WEIL: It's just a hallway --

12 JUDGE RILEY: Counsel, why don't you proceed
13 with your examination.

14 MR. BRADY: Okay.

15 Q All right. Do you have that in front of
16 you, Mr. Scholle?

17 A 1.1?

18 Q Yes. And, specifically, the attachment.

19 A Yes, sir.

20 MR. BRADY: I guess, Counsel, the first thing --
21 I'm just going to ask him to identify lines, the
22 titles, not, necessarily, numbers in these

1 questions. So, is that all right at this time?

2 MR. MOORE: Right.

3 JUDGE RILEY: I think it's the protection of the

4 numbers that we're after, right?

5 MR. BRADY: Yes.

6 Q Mr. Scholle, do you have the document

7 entitled, Novacon Holdings, LLC Balance Sheet in

8 front of you?

9 A Yes, sir.

10 Q With a date of January 31st, 2004?

11 A Yes, sir.

12 Q Okay. Can you identify -- this is just --

13 the balance sheet is one sheet, correct?

14 A Correct.

15 Q Okay. Can you identify on this sheet, on

16 this balance sheet, the lines that reflect the

17 acquisition of assets of Novacon LLC that occurred

18 on January 10th, 2004?

19 A Yes.

20 Q Which lines would those be?

21 A Accounts receivable would include some of

22 those assets.

1 Q Okay.

2 A Debt reserve, office equipment, computer
3 equipment, routing equipment, some of the accounts
4 payable, some of the customer deposits. I believe
5 some of the intangible assets.

6 Q All right. Can you turn to the following
7 page? And that document is entitled, Novacon
8 Holdings, LLC Income Statement for the one month
9 ending January 31st, 2004. Is that what you have in
10 front of you?

11 A Yes, sir.

12 Q Would you be able to indicate the lines on
13 this sheet that reflect acquisition of assets of
14 Novacon LLC as of January 10th?

15 A I believe so. But, this is an income
16 statement and it really reflects more of what
17 happened in the month of January rather than the
18 sale of assets.

19 Q So, this reflects, are you saying, more of
20 your operations as opposed to --

21 A Clearly some of the assets that we acquired
22 are reflected here in the income statement. Yes.

1 Q And, is it -- can you show me some of those
2 assets to date? And what do you think would not
3 be -- one question at a time.

4 Can you identify those lines on here
5 that would reflect assets that were transferred as
6 of January 10th from Novacon LLC?

7 A If you could clarify what you mean by the
8 term "assets."

9 JUDGE RILEY: I think, it's, principally, the
10 same question that you asked with regard to the
11 balance sheet, isn't it?

12 MR. BRADY: Yeah, principally, it is, I guess.

13 Q But, as I'm understanding it from -- this
14 is tracking something else than what is on the
15 balance sheet.

16 A This would be tracking our income for
17 January.

18 Q And wouldn't this transfer of assets be
19 considered income?

20 A No.

21 MR. BRADY: Your Honor, the next couple of
22 questions, actually, involve dollar amounts.

1 MR. WEIL: We'll have Mr. Levin step --

2 MR. ROWLAND: So, that Mr. Levin doesn't have to

3 stand in the hallway, there's, actually, some

4 chairs --

5 MR. LEVIN: I'm familiar with the building.

6 (Whereupon, Mr. Levin

7 left the hearing room.)

8 MR. BRADY: May we go in camera at this time?

9 JUDGE RILEY: Sure.

10 Is there any objection?

11 MR. WEIL: No.

12 JUDGE RILEY: Okay.

13 (Whereupon, the following

14 proceedings were had

15 in camera.)

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